IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 03.10.2007
CORAM

THE HON'BLE MR. JUSTICE S.MANIKUMAR

W.P.No.25209 of 2007

D.Prabagaran ... Petitioner

vs

1. The General Manager,
Personnel and Aministration
(R & A) Department,
Chennai Metropolitan Water
Supply and Sewerage Board,
Pumping Station Road,
Chintadripet, Chennai-2.

2.The Managing Director,
Chennai Metropolitan Water
Supply and Sewerage Board,
Chintadripet, Chennai-2. ... Respondents

Writ Petition filed under Article 226 of the constitution of India to issue a Writ of Certiorarified Mandamus to call for the records of the respondents relating to the proceedings No.CMWSSB/P&A/STF/RA1/18487/2007 dated 11.07.2007, quash the same and direct the respondents to consider the petitioner for promotion to the next higher post of Accounts Officer.

For Petitioner ... Mr.S.Raghavan

For Respondent ... Mr.B.Santha Kumar, Senior counsel
ORDER
The petitioner, a Junior Accounts Officer, who has not been included in the panel drawn up for promotion to the post of Accounts Officer for the year 2007-08, has challenged the said panel and sought direction to the respondents to consider him for promotion to the above said post.

2. Facts in brief are as follows:
The petitioner has submitted that he entered the service of Chennai Metropolitan Water Supply and Sewerage Board (CMWSSB) on 13.01.1981 and completed nearly 26 years of continuos service. In the month of July 2007, a panel of Junior Accounts Officer was drawn up for promotion to the post of Accounts Officer for the year 2007-08 and the petitioner, being eligible for the said post, ought to have been included in the panel. When the panel was under preparation, the petitioner submitted representations to the General Manager, Personnel and Administration (R & A) Department, CMWSSB, Chennai, the first respondent herein, on 21.02.2007 and 05.03.2007 for inclusion in the panel. But the name of the petitioner was omitted to be included in the panel dated 11.07.2007. According to the petitioner, his name should have been placed in the second position and the reason for non-inclusion of his name was possibly due to the punishment of stoppage of increment for a

period of three years without cumulative effect, which was imposed in February' 2005 for the alleged irregularity of giving an undertaking as Pay Disbursing Officer to the Tamil Nadu State Apex Co-operative Bank Ltd., for securing personal loan. He submitted that when the said loan has been repaid and there was no monetary loss to the respondents, the penalty imposed on the petitioner, ought not to have been considered at the time of empanelment.

3. The second respondent filed counter affidavit and submitted that the petitioner, being a Junior Accounts Officer of the CMWSS Board, gave a false undertaking as Pay Disbursing Officer to the Tamil Nadu State Apex Co-operative Bank Ltd., Chennai, eventhough, he was not a competent Pay Disbursing Officer, in respect of nine employees working in the Board, for securing personal loan from the said Bank and upon his undertaking, the Co-operative Bank, Periamet Branch granted personal loan to those employees. It is further stated that the petitioner had furnished false pay certificates to the above employees showing higher income to avail personal loans from the Bank. Since the above act amounted to dishonesty in connection with the Board's transaction, breach of integrity and devotion to duty under CMWSS Board's (Discipline and Appeal) Regulations 6 (23) and 6 (38), the petitioner was charge-sheeted and awarded punishment of stoppage of increment for a period of three years without cumulative effect vide Proc.No.CMWSSB/P&A/VC2/20845/2003, dated 08.02.2005.

4. The respondents further submitted that as per Regulation 22-A(V) of the Employees' Service Regulations 1978 of CMWSS Board, 1st April of every year is the crucial date for drawal of panel for promotion. As the petitioner is currently undergoing the punishment of stoppage of increment for three years, his name was passed over, as per the instructions of the Government in their letter Ms.No.248, P & AR (S) Department, dated 20.10.1997, which reads as follows:
"Any punishment, other than 'Censure' imposed on an Officer within a period of five years prior to the crucial date and a punishment of 'Censure' within a period of one year prior to the crucial date should be held against the Officer. In such a case the Officer's name should be passed over."
It is further stated that on completion of punishment of stoppage of increment in July'2007, the next increment of the petitioner will be granted in July'2008 and therefore, the petitioner will be eligible for consideration for inclusion in the panel for the year 2009-10 as per the instructions of the Government in their Lr.No.25165/S/98-1, dated 10.06.1998, which reads as follows:
"The punishment of censure has no currency. Whenever an officer in undergoing any punishment, other than censure, and the crucial date or on the date of consideration, then irrespective of the time of occurrence of the irregularity his name should be passed over from that panel. If the currency of punishment continues at the time of subsequent consideration for the next panel (s), he should still be passed over on the grounds that an officer should not be considered for promotion or promoted during the currency of any punishment."

The respondents have submitted that the above Government orders have been adopted by the Board vide its Res.No.114/2000, dated 06.03.2000 (B.P.No.12/2000, dated 13.03.2000) and therefore, the non-inclusion of the petitioner in the panel for the year 2007-08 of Accounts Officer, cannot be termed as arbitrary, warranting interference.

5. It is further submitted that out of 13 eligible candidates included in the panel dated 11.07.2007 for the year 2007-08, based on the estimated vacancies for the said year, nine persons were already promoted on 11.07.2007 in the existing vacancies. As the petitioner is not eligible to be considered for promotion as Accounts Officer for the year 2007-08, the respondents prayed for dismissal of the Writ Petition.
6. Mr.S.Raghavan, learned counsel for the petitioner submitted that the respondents ought to have considered the unblemished service of the petitioner and since the petitioner had already suffered the punishment of stoppage of increment without cumulative effect on the date of panel, withholding

of promotion for the same misconduct, would amount to double jeopardy. Referring to Rule 5(3) of the CMWSS Board Employees (Discipline and Appeal) Regulation, 1978, he submitted that the said regulation contemplates either one of the two punishments for a misconduct, viz., stoppage of increment or withholding of promotion and therefore, the respondents ought to have included the name of the petitioner in the panel for the year 2007-08. He further submitted that no reasons have been assigned by the respondents for overlooking the case of the petitioner and the action of the respondents casts a stigma in the service record of the petitioner.

7. Placing reliance on the unreported decision of this Court in W.P.No.11715 of 1999, dated 05.01.2007 and the Government Letter No.248/P &^ AR(S), Dept., dated 20.10.1997, learned counsel for the petitioner submitted that mere penalty of stoppage of increment should not be taken as disqualification for further promotion and that the appointing authority should exercise the discretion vested with him judiciously, examine the lapses, for which, the punishments were imposed and then decide the fitness of the individuals for further promotion. He further submitted that the above Government Order, has not been superseded and therefore, the respondents ought to have exercised their discretion judiciously and included the petitioner for further promotion.

8. On the other hand, Mr.Santha kumar, learned counsel for the respondents, referring to the Board resolution No.111/2000, dated 06.03.2000 as well as the instructions in the matter of empanelment of candidates to higher post, submitted that since the petitioner is undergoing the penalty of stoppage of increment for the current year, his name was passed over. He further submitted that withholding of promotion for the year 2007-08, in addition to stoppage of increment for three years, does not amount to double jeopardy. Rebutting the arguments of the learned counsel for the petitioner, he further submitted that the petitioner has committed serious misconduct by furnishing false pay certificates to nine employees working in the Board for obtaining personal loan from the Tamil Nadu State Apex Co-operative Bank Ltd., for which, he was inflicted with the penalty and therefore, the department had exercised their discretion judiciously, while drawing the panel for the post of Accounts officer and the action of the department cannot be termed as illegal, warranting interference. He further submitted that as per the Regulations, 1st April of every year is the crucial date for preparation of panel and since the penalty imposed on the petitioner would be completed in July'2007, the case of the petitioner would be considered in April' 2009. He further submitted that the decision in W.P.No.11715 of 1999, dated 05.01.2007, has already been challenged by way of Writ Appeal and the Division Bench of this Court had granted interim stay of the said order and therefore, no reliance can be placed on the orders passed in the above Writ Petition.

9. Heard the counsel appearing for the parties and perused the materials available on record.

Before adverting to the facts of this case, it is relevant to have a cursory perusal of the relevant regulations and the Government instructions relating to preparation of panel and the effect of punishments on inclusion in the panel.

10. Regulation 22-A under the CMWSS Board Employees (Discipline and Appeal) Regulation, 1978 deals with the preparation of the panel for promotion to the higher post, which are extracted hereunder.

"22-A: Approved candidates:
i)All first appointments to a service or class or category for Grade thereof; where by direct recruitment or by recruitment by transfer or by promotion, shall be made by the appointing authority from a list of approved candidates. Such list shall be prepared in the prescribed manner by the appointing authority or any other authority empowered in the CMWSS Board Special Regulations in that behalf. Where the candidates in such list are arranged in their order of

preference appointments to the service shall be made in such order.
ii).....
iii).....
iv).....
v)In the matter of preparation of panel for promotion posts of grades, 1st April of every year is fixed as crucial date.
vi)The list of approved candidates selected for appointment to all categories indicating the order in which the appointments have to be made, should be published in the Notice Board.
vii)The list should be communicated to all persons concerned that is to those in the list as well as persons senior to the junior included in the list, whose names have not been included.
viii)Any person who wishes to make a representation against his non-inclusion of his name in the list shall make his representation within a period of two months from the date of publication of the list in the Notice Board. If no representation is received within the above period, the list communicated shall be deemed to final.
ix)The period of one year validity for the list of approved candidates shall be reckoned from the date of approval by the competent authority."

11. The Government instructions in the matter of preparation of the panel for appointment by promotion/recruitment by transfer, in G.O.Ms.No.248/P & AR (S) Department, dated 20.10.1997 and further instructions issued in Govt.letter No.25165/S/98-1, dated 10.06.1998, regarding the effect of punishment of inclusion of the panel for further promotion, are as follows:

12. The Government in G.O.Ms.No.368, Personnel and Administrative Reforms (S) Department, dated 18.10.1993, directed the Heads of Departments/Departments of Secretariat to follow certain norms for preparing the panels for appointment by promotion/recruitment by transfer for State and Subordinate Services. Subsequently, the Government in their letter in Ms.No.248/P & AR (S) Department, dated 20.10.1997, directed that the norms contained in the said letter should be read along with the existing guidelines issued in the above Government Order, uniformly in all cases, without giving any room for difference in norms from one Department to another. Clause 4-II of the above letter is extracted hereunder:

"II. EFFECT OF PUNISHMENTS ON INCLUSION IN THE PANEL:
1. As warning or severe warning is not a statutory punishment and since there is no provision or appeal, it need not be held against the Officer, whether it was awarded after framing of charges under Rule 17(a) or 17(b) of the Tamil Nadu Civil Services (D & A) Rules.
2. Any punishment, other than 'Censure', imposed on an Officer within a period of five years prior to the crucial date and a punishment of 'Censure' within a period of one year prior to the crucial date should be held against the Officer. In such a case the Officer's name should be passed over.
Provided that if the Officer was imposed with any of the punishments within the check period as mentioned above for irregularities/delinquencies which occurred five years prior to the date of punishment, such punishment need not be held against him.
Provided that an Officer passed over once, need not be passed over for the second time on account of the same punishment at the time of subsequent consideration for the next panel.
3) Currency of punishment:
Whenever an officer is undergoing a punishment and there is currency of punishment on the crucial date the name should be passed over at the time of first consideration irrespective of the time of occurrence of irregularity. If the currency of that punishment continues at the time of subsequent consideration for the next panel then the name may be included in the panel, on the basis that a name should not be passed over for the second time on account of the same punishment.
4) It is further clarified that charges framed under Rule 17(b) of the Tamil Nadu Civil Services (D & A) Rules and any of the punishments awarded after the crucial date and till the date of issue of the

panel, shall also be taken into consideration for assessing the suitability of the Officer for inclusion in the panel."

Subsequently, the Government in letter No.25165/S/98-1, dated 10.06.1998, amended Clause 4-II(3) of the above Government Letter and substituted as follows:
"The punishment of censure has no currency. Whenever an officer is undergoing any punishment, other than censure, on the crucial date or on the date of consideration, then irrespective of the time of occurrence of the irregularity, his name should be passed over for that panel. If the currency of punishment continues at the time of subsequent consideration for the next panel (s), he should still be passed over on the grounds that an officer should not be considered for promotion or promoted during the currency of any punishment. After the completion of its currency, no punishment should be held, once again, against an official even it fails within the check period of any panel, if it has already been held against the official on any earlier occasion."

13. The Board in their resolution in Res.No.114/2000, dated 06.03.2000, adopted to follow the above said norms and instructions issued by the Government and issued Board proceedings in B.P.No.12 of 2000, P & A (R & A) Department, dated 13.03.2000. In the light of the above said instructions, all the departments have to scrupulously follow the consolidated instructions issued by the Government in the matter of preparation of panel and CMWSSB is no exception to the same.

` 14. This Court in W.P.No.11715 of 1999, dated 05.01.2007, at Paragraph 21, has held as follows:
"21. During the period of withholding the increment, promotion may be considered or may not be considered and it is for the appointing authority, but after the punishment is worked out, for example, if increment is withhold for a period of one year and after completion of one year there is no other punishment on the head of the employee, then his promotion should be considered, because the period of punishment is completed."

15. In Duraikannu.K. v. State of Tamil Nadu reported in 2006 (1) MLJ 598, this Court at Paragraph 7 held as follows:
"Whenever an officer is undergoing any punishment other than 'Censure' on the crucial date or on the date of consideration, irrespective of the time of occurrence of the irregularity, his name shall be passed over. Only after the completion of the currency of punishment the name of such officer shall be considered for inclusion in the panel. In short, the name of an officer can be included in the panel for promotion only when an order of Censure is passed against him, irrespective of the time of occurrence of the irregularity, and in all other cases of punishment, his name shall be passed over till the expiry of punishment period."

16. The Supreme Court in L.Rajaiah v. Inspector General of Registration & Stamps, Hyderabad and others reported in 1996 (8) SCC 246, considered the case of denial of promotion on the ground of punishment of stoppage of increment and at Paragraph 4, held as follows:
"when seniority-cum-fitness is the criteria, the imposition of the penalties for one year on 01.03.1988 and in another enquiry, stoppage of increment for five years from 01.03.1989, i.e., till 28.02.1994, disentitiled him to be considered; so he did not regain fitness for consideration for promotion as he was under disability undergoing punishment. Consequently, when the promotion to the post of Senior Assistant is on the basis of merit and ability under special rules, fitness is one of the considerations for the purpose. Since he was undergoing punishment during the relevant period, he is not eligible for consideration for promotion."

17. The issue as to whether, withholding of promotion due to punishment would amount to double jeopardy, is no more res integra, as the same has been considered by the Supreme Court in Union of India v. K.V.Jankiraman reported in 1991 (4) SCC 109, at Paragraphs 28 and 29, the Supreme Court

held that,
"28. The Tribunal has also struck down the following portion in the Section sub-para after clause (iii) of para 3 which reads as follows: 'if any penalty is imposed on the officer as a result of the disciplinary proceedings or if he is found guilty in the Court proceedings against him, the findings in the sealed cover/covers shall not be acted upon' and has directed that if the proceedings result in a penalty, the person concerned should be considered for promotion in a Review DPC as on the Original date in the light of the results of the sealed cover as also the imposition of penalty, and his claim for promotion cannot be deferred for the subsequent DPCs as provided in the instructions. It may be pointed out that the said sub-paragraph directs that 'the officer's case for promotion may be considered in the usual manner by the next DPC which meets in the normal course after the conclusion of the disciplinary/court proceedings'. The Tribunal has given the direction in question on the ground that such deferment of the claim for promotion to the subsequent DPCs amount to a double penalty. According to the Tribunal, 'it not only violates Articles 14 and 16 of the Constitution compared with other employees who are not at the verge of promotion when the disciplinary proceedings are intiated against them but also offends the rule against double jeopardy contained in Article 20(2) of the Constitution'. The Tribunal has, therefore, held that when an employee is visited with a penalty as a result of the disciplinary proceedings there should be a review DPC as on the date when the sealed cover procedure was followed and the Review DPC should consider the findings in the sealed cover as also the penalty imposed. It is not clear to us as to whey the Tribunal wants the Review DPC to consider the penalty imposed while considering the findings in the sealed cover if, according to the Tribunal, not giving effect to the findings in the sealed cover even when a penalty is imposed, amounts to double jeopardy. However, as we read the findings of the Tribunal, it appears that the Tribunal in no case wants the promotion of the officer to be deferred once the officer is visited with a penalty in the disciplinary proceedings and the Tribunal desires that the officer should be given promotion as per the findings in the sealed cover.
29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when he penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the lease that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequences of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on the ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date becaue of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion.

For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-para after Clause (iii) of para 3 of the said memorandum. We therefore, set aside the said findings of the Tribunal."

18. In yet another decision in Collector of Thanjavur District v. S.Rajagopalan reported in 2000 (9) SCC 145, the Apex Court, while considering the question as to whether, withholding of promotion due to the punishment of stoppage of increment at the time of empanelment of the candidates would amount to double jeopardy, at Paragraph 7, held as follows:
"We respectfully follow the said decision. It has been clearly pointed out there that the denial of promotion would not amount to penalty and that it would be open to the authorities to take into account the fact that some punishments were imposed on them during the relevant period."
In the above reported case, some of the Assistants, whose names were not included in the list of Deputy Tahsildars for the year 1982, challenged their non-inclusion of the panel before the Tribunal on the ground that the stoppage of increment was a minor penalty and therefore, the Department ought not to have considered the said penalty which were imposed against them during the anterior period. The Tribunal issued a direction that the names of the petitioners should be considered uninfluenced by the minor punishment inflicted on them and that if by such consideration they were found fit for inclusion in the list, suitable placement be allotted to them in the list of seniority for the cadre. The Supreme Court set aside the judgment of the Tribunal.

19. Therefore, the contention of the learned counsel for the petitioner that withholding of promotion due to minor penalty of stoppage of increment amounts to double penalty is not tenable.

20. Regarding the contention that there is a failure on the part of the appointing authority to exercise the discretion judiciously as per the guidelines contained in Govt.Lr.No.248/P &^ AR(S), Dept., dated 20.10.1997 and that the respondents have failed to apply the above said Government Order coupled with the directions of this Court given at Paragraph 21 of the unreported order in W.P.No.11715 of 1999, dated 05.01.2007, it is evident that the Government have issued norms in Govt.Lr.No.25165/S/98-1, dated 10.06.1998 and the same were adopted by the Board in B.P.No.12 of 2000, P & A (R & A) Dept., dated 13.03.2000. Once the Board has adopted the revised guidelines and norms issued by the Government for preparation of the panel of eligible candidates for promotion, the later guidelines alone are applicable for empanelment. Therefore, the instructions issued in the year 1993, can no longer be applied.

21. As per the Regulations 22(5) to 22(8) of the CMWSSB (Discipline and Appeal) Regulations, whenever a list of approved candidates selected for appointment to all categories indicating the order, in which, the appointment have to be made, should be published in the Notice Board. The list should be communicated to all the persons concerned, that is to those in the list as well as the persons senior to the junior included in the list, whose names have not been included. Any person who wishes to make a representation against his non-inclusion of his name in the list shall make his representation within a period of two months from the date of publication of the list in the Notice Board. If no representation is received within the above period, the list communicated shall be deemed to final.

22. Perusal of the impugned panel dated 11.07.2007 discloses that the officers concerned were served with a notice through their controlling officer and there is no material to show that the petitioner has made any representation to the CMWSSB or to the competent authority and therefore, by virtue of the operation of the above said regulations, the list has communicated become final. The contention of the learned counsel for the petitioner that no reasons were assigned for overlooking the case of the petitioner does not deserve any consideration for the reason that those, who have been omitted to be included in the panel are given an opportunity to represent as soon as the list is

communicated to them. At the time of empanelment, the appointing authority considers the names of all the candidates, who fall within the Zone of consideration and makes a comparative assessment, their qualifications, performance, conduct and decide their fitness for the promotion. Preparation of panel is enlisting of meritorious candidates, seniority being equal and there is no controversy between the parties to be adjudicated, which requires prior notice. Further, the statute or regulations do not contemplate that each of the unsuccessful candidates should be informed with the reasons for overlooking their case for further promotion and therefore, it cannot be demanded as a matter of right.

23. In the light of the decisions of the Supreme Court, this Court is of the view that infliction of the punishment of stoppage of increment casts a stigma on the Government servant in the discharge of his official function and it is certainly a relevant factor to be taken into account in evaluating the merit cum ability of the concerned person, while empaneling eligible candidates for promotion to higher post. Withholding of promotion by the appointing authority for the reason that the Government servant was inflicted with a punishment of stoppage of increment, will not amount to double jeopardy. Further, if there is any currency of punishment, the same would disentitle the Government servant for consideration for further promotion. In case of a selection to higher post where merit cum fitness has to be considered, mere seniority in service alone will not confer any right to be included in the panel and he has only a limited right to be considered for promotion. In the case on hand, the respondents have considered the case of the petitioner with reference to the statutory regulations as well as the Government Orders in force, which was adopted by the Board and I found that he is not eligible for promotion. I do not find any illegality or irregularity in the impugned panel for the year 2007-08. There are no merits in the Writ Petition.

24. In the result, the Writ Petition is dismissed. No costs.

03.10.2007
Index: Yes
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S. MANIKUMAR, J.
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To
1. The General Manager,
Personnel and Aministration
(R & A) Department,
Chennai Metropolitan Water
Supply and Sewerage Board,
Pumping Station Road,
Chintadripet, Chennai-2.

2. The Managing Director,
Chennai Metropolitan Water
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